UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC.,	*	
	*	
Employer,	*	
	*	**CASE NO. 7-RC-22141**
and	*	
	*	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,	*	
	*	
Petitioner.	*	
	*	
BEVERLY ENTERPRISES-MINNESOTA, INC., D/B/A/ GOLDEN CREST HEALTHCARE CENTER,	*	**CASE NOS. 18-RC-16415**
	*	**18-RC-16416**
	*	
Employer,	*	
	*	
and	*	
	*	
UNITED STEELWORKERS OF AMERICA, AFL-CIO,	*	
	*	
Petitioner.	*	
	*	
CROFT METALS, INC.,	*	
	*	**Case No. 15-RC-8393**
Employer,	*	
	*	
and	*	
	*	
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS FORGERS AND HELPERS, AFL-CIO,	*	
	*	
Petitioner.	*	
	*	

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE OHIO HOSPITAL ASSOCIATION AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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ATTORNEYS FOR AMICI CURIAE

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STATEMENT OF AMICI CURIAE INTEREST[1]

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interest of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to the National Labor Relations Act ("NLRA" or "Act"). The Ohio Hospital Association ("OHA") currently represents approximately 170 hospitals and 40 health systems throughout Ohio, and it has more than 1,900 personal members of 11 affiliated societies, representing disciplines from hospital marketing to human resources. The OHA mission is to provide leadership. OHA works with members in meeting the health care needs and improving the health status of the communities they serve. The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 150,000 professional and student members throughout the world. Of these 150,000 members, 9,116 self-identify as members of the health care field.

The instant matters are of interest to the Chamber, OHA and SHRM (collectively "Amici") because they believe that, in the past, the National Labor Relations Board's ("Board's") application of 29 U.S.C. § 152(11) [hereinafter "Section 2(11)"] has rested on incorrect, non-textual interpretations of the Act. Such interpretations have, among other things, negatively

[1] This Brief is submitted pursuant to the Board's July 25, 2003 Notice and Invitation to File Briefs in the above-captioned cases. No counsel for any party in the above-captioned cases had a role in authoring this brief, and no other person other than the named Amici and their counsel has made any monetary contribution to the preparation and submission of this brief.

affected the provision of health care in this country. Therefore, it is Amici's position that the Board should, in these cases, implement a textually-based interpretation of Section 2(11) that gives effect to Congress' intent as stated in the plain language of the Act.

INTRODUCTION AND SUMMARY

The instant matters involve important public policy issues that, among other things, implicate the structure of the nation's health care delivery system. Under Section 2(11), an employee is a supervisor if 1) he or she has the authority to engage in one of twelve statutorily stated supervisory activities; 2) the employee exercises such authority in the interests of the employer; and 3) the exercise of the employee's authority is not routine or clerical but involves the use of independent judgment. See NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001). Congress enacted this provision to ensure to employers the complete loyalty of those employees who direct and "supervise" an employer's business. See, e.g., Florida Power & Light Co. v. Int'l Bhd. of Elec. Workers, Local 641, 417 U.S. 790, 807 (1974). It considered such loyalty essential to maintain the balance of power in the workplace between unions and employers. See id. at 811.

Congress' concern applies to all fields of employment, and it is no less applicable in the health care context than in other areas. Indeed, many nurses and other health care professionals are employed in roles that require the continual exercise of independent judgment in a variety of supervisory tasks that are critical to the provision of quality care. Many of these supervisory judgments dramatically affect the health status of patients, and may even involve matters of life or death. Nurses and other health care professionals in various health care settings give minute-to-minute, let alone hourly or daily, supervisory instructions to other nurses, technical employees, aides, orderlies, and clerical employees. The nature of this decisionmaking is as varied and complex as is the often-changing nature of a patient's medical condition. It is critical,

not only from a general management perspective, but also from a quality of care perspective, that an employer have an ability to exercise considerable control over the delivery of health care services in such an environment, just as it is important for a non-health care employer to have control over the workings of its business to ensure productivity and profitability, and to avoid litigation.

Notwithstanding the policies behind Section 2(11), prior Board cases have interpreted and applied Section 2(11) in such a manner as to deny many classes of employees, including nurses and other health care professionals, Section 2(11) supervisor status as a matter of course. Such cases primarily sought to impose strained limitations on two of Section 2(11)'s stated supervisory functions: "assign" and "responsibly to direct." See, e.g., Public Serv. Co. v. NLRB, 271 F.3d 1213, 1220-21 (10th Cir. 2001) (noting "the running battle that the Board has conducted over the years to indirectly limit the impact of Congress' inclusion of the phrase 'responsibly to direct' in Section 2(11) through overly narrow interpretations of other parts of the statutory text"); see also Wilma B. Leibman & Peter J. Hurtgen, The Clinton Board(s)—A Partial Look From Within, 16 Lab. Law. 43, 48 (2000) ("While health care employers make a variety of supervisory arguments, the question usually boils down to whether the charge nurses have the statutory authority to 'assign' or 'responsibly direct' other employees."). In a results-oriented and policy driven fashion, such decisions extended coverage of the Act beyond the limits defined by Congress, and in a manner that adversely impacted the ability of health care providers to effectively oversee the delivery of quality care to patients.

These prior Board approaches, however, were not faithful to the language of Section 2(11), and they were not well-received by the Courts. In 1994, the Supreme Court rejected the prior Board position that assignments, directions and other nominally supervisory acts taken in

connection with patient care are not "in the interest of the employer" for the purposes of Section 2(11). See NLRB v. Health Care & Ret. Corp., 511 U.S. 571, 584 (1994) (hereinafter "HCR"). Then, in 2001, the Supreme Court rejected the Board's post-HCR position that assignments, directions and other nominally supervisory acts grounded in professional or technical knowledge did not involve the exercise of "independent judgment" for the purposes of Section 2(11). See Kentucky River, 532 U.S. at 712-21. Additionally, decisions from the Courts of Appeals,[2] in both the health care context and elsewhere, were highly critical of prior Board attempts to stray from the language of Section 2(11), particularly after HCR. See, e.g., Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 340 n.8 (4th Cir. 1998) ("We are not the first court to wonder whether [the Board's] new interpretation [of independent judgment] is an end run around an unfavorable Supreme Court decision in order to promote policies of broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair labor practice findings it makes."); see also Integrated Health Servs. of Mich., Inc. v. NLRB, 191 F.3d 703, 707 (6th Cir. 1999) (noting the Board's "'unique' misapprehension of the manner in which § 2(11) applies to nurses"); NLRB v. Attleboro Assocs., 176 F.3d 154, 160 (3d Cir. 1999) (noting the Board's "biased mishandling of cases involving supervisors") (internal quotations and citations omitted); Spontenbush/Red Star Cos. v. NLRB, 106 F.3d 484, 492 (2nd. Cir. 1997) (noting "the Board's manipulation of the definition of supervisor"); NLRB v. Winnebago Television Corp., 75

[2] Commentators, too, have been critical of the seemingly results-driven nature of prior Board approaches to nurse supervisory issues. See, e.g., G. Roger King, Where Have All the Supervisors Gone?—The Board's Misdiagnosis of Health Care Retirement Corp., 13 Lab. Law 343, 347-48 (1997) (noting the prior Board's "continue[d] . . . manipulat[ion] of Section 2(11)'s definition of a 'supervisor'" following HCR); Note, The NLRB and Supervisory Status: An Explanation of Inconsistent Results, 94 Harv. L. Rev. 1713, 1713-27 (1981) (arguing that, in prior Board cases, "borderline individuals were found to be supervisors when that determination had the effect of attributing liability to an employer for an individual's actions . . . . In contrast, borderline individuals were found to be employees when that determination protects them from an employer's sanction.").

F.3d 1208, 1214 (7th Cir. 1996) (same); Schnuck Mkts., Inc. v. NLRB, 961 F.2d 700, 704 (8th Cir. 1992) (same); NLRB v. St. Mary's Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982) (same).

The prior Board decisions also represented poor public policy. In the health care field, for instance, such approaches created the risk of long-term-care facilities and acute-care hospitals not having a sufficient number of supervisory nurses and other health care professionals to effectively and efficiently manage and direct the delivery of many health care services. The impact of such approaches was particularly difficult for health care providers, given the malpractice litigation scrutiny and the cost-containment pressures that increasingly are placed upon such institutions. Establishment of innovative managerial structures with appropriate supervisory models is critical to the delivery of high quality patient care and the development of an efficient and productive health care delivery system. By routinely denying nurses and other health care professionals Section 2(11) supervisory status, prior Board decisions severely compromised the health care employer's ability to select, control, compensate and ensure the ultimate loyalty of such individuals. Indeed, the critical irony is that Section 2(11) supervisory status has been more easily and more frequently established in virtually all other industries—although it is in health care where the lack of appropriate supervision can result in the loss of life or long-term, severe medical consequences for the patient and corresponding significant financial liability for the employer.

The detrimental effects, however, of prior Board decisions seeking to limit the intended reach of Section 2(11) have been, by no means, limited to the health care field. Although the Board's theories were often developed in health care cases, they were applied elsewhere, depriving employers in other industries of the ability to reliably maintain adequate levels of supervision. See, e.g., Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 211 (5th Cir. 2001)

(rejecting the Board's theory that employees in a power plant who "use their technical expertise and judgment to make complex decisions . . . in assigning and directing others" were not Section 2(11) supervisors).[3] As such, employers in all industries have great interest in ensuring that Section 2(11) is fairly and properly applied as Congress intended.

The Chamber, OHA and SHRM thus submit that the Supreme Court's decision in Kentucky River has presented this Board with a unique opportunity to return to a textually based interpretation of Section 2(11), particularly with regard to the provision's use of terms such as "independent judgment," "assign," and "direct." This approach will ensure that employers in all industries will be able to securely maintain sufficient supervisory staffs to ensure efficient operations and Congress' desired balance between management and labor. Furthermore, in the health care field, such an approach will permit health care providers to maintain supervisory staffs sufficient and necessary for the provision of quality health care to patients.[4] Indeed, it is this Board's duty to avoid the missteps of prior Board decisions and to give effect to Congress' intent as expressed in the plain language of Section 2(11).

ARGUMENT

The Board should resolve the cases before it by implementing a straightforward, textually based interpretation of Section 2(11). Such an interpretation of the Act is the only one that gives

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[3] See also Kenneth R. Dolan, The Supreme Court's Rejection of Excluding Ordinary Professional or Technical Judgment as Independent Judgment When Directing Employees: Does Kentucky River Mean Lights Out For Mississippi Power?, 18 Lab. Law. 365 (Winter/Spring 2003) (arguing, from a non-health care context, that the Board must recognize that "professionals, technicians, and 'quasi-professionals' and 'quasi-overseers' [are] Section 2(11) supervisors when they exercise independent judgment that is only loosely constrained by their employers in directing less-skilled employees").

[4] Amici acknowledge that the determination of supervisory status under Section 2(11) requires, among other things, a detailed application of the facts of a particular case to the applicable statutory criteria. Thus, they do not advocate a per se rule defining which particular classification of employees are supervisors for the purposes of the NLRA. In the health care context, however, as was recognized recently by the United States Court of Appeals for the Third Circuit, "similar organizational structures exist throughout the nursing home industry." Attleboro Assocs., 176 F.3d at 163. As such, prior Board holdings effectively implementing a per se rule that nurses and other health care professionals are not supervisors had far-reaching detrimental effects, and it is this Board's duty to avoid such consequences, both in health care and elsewhere.

effect to Congress' stated intent that employers have sufficient supervisory staff to maintain efficient operations, and it is the only interpretation that maintains the appropriate labor/management balance in the workplace. Furthermore, in today's health care environment, it is the only interpretation that furthers the delivery of quality patient care. As such, Amici submit that each of the questions posed by the Board's Notice and Invitation to File Briefs should be answered with reference to the plain language of Section 2(11). Stated alternatively, the Board should not approach Section 2(11) in a results-oriented fashion, expanding the definition of Section 2(11) in unfair labor practice cases when a finding of supervisory status would result in employer liability, and concurrently limiting the definition when supervisory issues are present in representation cases. Amici further submit that the supervisory decisions before the Board should be overturned to the extent that they have strayed from the textually based interpretation of Section 2(11) advocated in this Brief.

A. The Meaning of the Term "Independent Judgment"

In its Notice and Invitation to File Briefs, the Board first asks for positions on the meaning of the term "independent judgment" as it is used in Section 2(11), and as to the degree of discretion required for a finding of supervisory status. This request follows the Supreme Court's statement in Kentucky River that the phrase "independent judgment," as used in Section 2(11) "is ambiguous with respect to the degree of discretion required for supervisory status." 532 U.S. at 713. The Court further stated that, given this ambiguity, the Board has "discretion to determine, within reason, what scope of discretion qualifies" an employee as a supervisor under Section 2(11). Id. In two of the cases presently before the Board, Regional Directors seized on this language from the Court's Kentucky River decision and made determinations that the judgment at issue was not independent because it was constrained by employer policies and procedures. See Beverly Enters.-Minn., Inc., Case Nos. 18-RC-16415 & 18-RC-16416, slip op.

at 4 (2002) ("I conclude that the judgements of charge nurses are so circumscribed by existing policies, order and regulations of the employer that they do not exercise independent judgment within the meaning of Section 2(11)."); Oakwood Healthcare, Inc., 7-RC-2241, slip op. at 19 (2002) ("The limited authority of RNs to assign discrete tasks to less skilled employees, based on doctor's orders, hospital policy and procedures or standing orders, or what is dictated by their profession, does not require the use of independent judgment."). It is Amici's position that these determinations are erroneous for the reasons listed below.

With all due respect to the Supreme Court, the phrase "independent judgment" is not ambiguous, and the Board must ascribe to it the plain and ordinary meaning of its words. "Judgment" encompasses decisionmaking—i.e., "the operation of the mind, involving comparison and discrimination, by which a knowledge of the values and relations of things . . . is obtained." Webster's Revised Unabridged Dictionary 804 (1913) (hereinafter "Webster's")[5]; see also The Oxford English Dictionary, Vol V, J 618 (1933) (defining judgment as the act of forming "an opinion or notion concerning something by exercising the mind on it") (hereinafter "OED"). The word "independent" means free from control by others. See, e.g., Webster's 750 (defining independent as "[n]ot dependent; free; not subject to control by others; not relying on others; not subordinate"); OED, Vol. V, I 200 (defining independent as "[n]ot depending upon the authority of another; not in a position of subordination or subjection; not subject to external control or rule; self-governing; autonomous; free"). Thus, "independent judgment," for the purposes of Section 2(11), constitutes autonomous decisionmaking, or decisionmaking that is not so regimented and constrained by the employer so as to render it rote, routine, and without creative thought. See 29 U.S.C. § 152(11) (contrasting "independent judgment" with judgments

[5] Available online at *http://humanities.uchicago.edu/forms_unrest/webster.form.html* (last visited Sept. 18, 2003).

that are merely "clerical" or "routine"); Beverly Enters., Va., Inc. v. NLRB, 165 F.3d 290, 295 (4th Cir. 1999) (holding that Section 2(11)'s independent judgment language requires that judgement "be exercised in a non-ministerial way to achieve management goals").

Consistent with the ordinary meaning and definition of the phrase "independent judgment" as outlined above, an employer's standing orders, policies, and procedures reduce judgment to a level below independent thought only where such directions and policies preclude the exercise of autonomous decisionmaking. A careful analysis reveals that this was the position favored by the majority in Kentucky River. In noting that "detailed orders and regulations issued by the employer" could, in certain circumstances, reduce "the degree of judgment that might ordinarily be required to conduct a particular task" to a level below that of "independent judgment," Kentucky River, 532 U.S. at 713, the Court illustrated its point by citing to Chevron Shipping Co., 317 NLRB 379, 381 (1995). In Chevron Shipping, the employer had issued standing orders that required the watch officer—the purported supervisor—to "contact a superior officer when anything unusual occurs or when problems occur." Id. (emphasis added). Such orders thereby completely prevented the purported supervisor's exercise of independent thought in non-routine situations and, consequently, precluded a finding of Section 2(11) status. See also NLRB v. Meenan Oil Co., L.P., 139 F.3d 311, 321 (2nd Cir. 1998) (holding that assignments did not involve independent judgment where they were based on "detailed procedures issued by management," including a computer program that automatically created groupings of delivery tickets); Highland Superstores, Inc. v. NLRB, 927 F.2d 918, 921 (6th Cir. 1991) (holding that employer-provided schedule precluded alleged supervisor's use of independent judgment in assignment of employees, finding that "[t]he work was so routine that employees would often consult the schedule, not the leadmen, for a new assignment").

Lower courts have similarly held that whereas an employer could, in theory, so circumscribe judgment as to render it non-independent, the mere existence of employer orders, policies, procedures or protocols does not preclude the exercise of independent judgment for Section 2(11) purposes. See, e.g., NLRB v. Quinnipiac College, 256 F.3d 68, 75-76 (2nd Cir. 2001) (holding that "the existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive" and holding that the "evidence here indicates that the shift supervisors continued making assignment decisions, based on their own expertise and experience, despite the existence of College policies and procedures"); NLRB v. Prime Energy Ltd. Partnership, 224 F.3d 206, 211 (3rd Cir. 2000) (rejecting determination that assignments were made pursuant to routine and pre-determined classifications where the evidence showed that supervisors "weighed the relative urgency of immediate and unforeseen problems and directed Plant Operators to undertake necessary tasks"); Glenmark Assocs., 147 F.3d at 340-41 ("The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think."). The Board, too, recently made a similar finding in Alter Barge Line, Inc., 336 NLRB No. 132 (2001), where it affirmed an ALJ's determination that barge pilots were supervisors notwithstanding the existence of standing "orders," where those orders were the same as those that applied to the pilot's superiors and, in all events, were of "a general nature."

Congress, similarly, viewed assignments, directions, and other similar acts that involve the reasoned application of general employer policies and procedures as constituting the quintessential aspects of supervision. This point is emphasized by the legislative history of Section 2(11)'s "responsibly to direct" language. Following the adoption of Senate Report No.

105, Senator Flanders, in successfully proposing an amendment adding this language to Section 2(11) stated the following:

> Many of the activities described in paragraph (11) are transferred in the modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining or otherwise following the recommended action.
>
> In fact, under some management methods the supervisor might be deprived of authority for most of the functions enumerated [in Section 2(11)] and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees. . . ." Their essential managerial duties are best defined by the words "direct responsibly," . . . .

93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders) (emphasis added). Thus, where a supervisor—using his or her personal judgment—gives direction to employees in order to implement general employer orders, he or she has performed an "essential managerial dut[y]" and is properly found to be a supervisor. A contrary position would produce the nonsensical result that even supervisory acts as fundamental as issuing discipline in accordance with a progressive disciplinary policy were not "supervisory" for the purposes of Section 2(11). Further, "industrial common sense" establishes that virtually all employers have policies, procedures, work guidelines, and the like generally directing their workforces and providing guidance to their management. Indeed, the Board should take judicial notice that often such policies and directives are required by or the result of government regulation.

In light of the above-listed standards, determinations in Beverly Enters.-Minn., Inc. and Oakwood Healthcare, Inc. that employer policies and procedures circumscribed judgment to a level below that of independent thought appear to be little more than new-found efforts to evade—once again—the plain language of Section 2(11). See Public Serv., 271 F.3d at 1220-21 (noting the Board's "running battle" to indirectly limit the impact the phrase "responsibly to direct" through overly narrow interpretations of "independent judgment" and other Section 2(11) phrases). Neither case specifically and concretely articulated the standards by which it made such determinations. Furthermore, neither set forth a detailed application of record evidence demonstrating that employer standards precluded the application independent thought. See, e.g., Evergreen New Hope Health & Rehabilitation Ctr., 2003 WL 21259895 at *1 (9th Cir. May 27, 2003) ("The Board argues that the lengthy manuals provided at each nursing station so constrain the discretion of the charge nurses' decision-making that they cannot be said to be exercising independent judgment. The smidgen of excerpts of the manuals put into evidence does not show any routinization of the charge nurses' functions or depravation of supervisory authority."); cf. Schnurmacher Nursing Home v. NLRB, 214 F.3d 260, 266 (2nd Cir. 2000) (rejecting "naked assertions" and "rote" conclusions that certain responsibilities were routine and did not require independent judgment).

Indeed, Oakwood Healthcare's conclusory finding that the employer "possesses a very specific policy" that would circumscribe judgment with regard to "every task performed by an RN" is facially absurd given the complex and unpredictable nature of the life-and-death situations faced by nurses on a daily basis, as well as the need for instantaneous action to respond to such situations. See, e.g., Quinnipiac College, 256 F.3d at 78 (rejecting contention that policy manual constrained judgment where "the record shows that the shift supervisors independently

handle emergency situations . . . . This includes those emergency situations which do not admit of resolution by rote reference to a policy manual."); Schnurmacher, 214 F.3d at 269 (finding that charge nurses were supervisors because "where one must both determine a treatment and ensure that others administer the treatment, it can hardly be said that supervisory authority is not being exercised"); Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1553 (6th Cir.1992) ("It is perfectly obvious that the kind of judgment exercised by registered nurses in directing LPNs and nurse's aides in the care of patients . . . is not 'merely routine.' ").

In short, it is the Board's duty in Beverly Enters.-Minn., Inc. and Oakwood Healthcare, Inc., as well as in Croft Metals, to ensure that a textually honest interpretation of "independent judgement" is fairly and accurately applied. As such, the supervisory determinations in these cases should be overturned.

B. The Distinction Between "Assign" and "Direct"

The Board's Notice and Invitation to File Briefs next solicits positions as to the difference if, any, between Section 2(11)'s use of the terms "assign" and "direct." Cf. Providence Hosp., 320 NLRB 717, 727 (1996) (noting that the Board had not defined the "exact perameters of the term 'assignment' under Section 2(11)"). Amici submit that there is, indeed, a distinction between the two provisions. See, e.g., id. at 736 (Cohen dissenting) (noting the maxim that the Act must be interpreted so that "each and every section is to be given effect"). Amici further submit that, once again, the plain meaning of the text controls the interpretation of these terms.

To "assign" is to "appoint; to allot; to apportion; to make over." Webster's 91; OED Vol. I, A 508 (defining assign as "to allot or appoint to a person"). To direct, on the other hand, means to "determine the direction or course of; to cause to go on in a particular manner; to order in the way to a certain end; to regulate; to govern" or to " point out to with authority; to instruct as a superior; to order." Websters 416; OED, Vol. III, D 389 (defining direct as to "regulate,

control, govern the actions of"). Thus, the authority to assign employees is the power to appoint them to specific tasks or to allot work to them. See, e.g., Glenmark Assocs., 147 F.3d at 342 (holding that having the ability to assign "constitutes the power to put the other employees to work when and where needed") (internal quotes and alterations omitted).[6] The authority to direct employees is the power to regulate or govern them in the performance of that work. See, e.g., Entergy Gulf States, 253 F.3d at 209 (holding that one who responsibly directs is answerable for employees "discharge of a duty" or their ultimate "work product").

The importance of the distinction between assignment and direction is clear. See, e.g., Kentucky River, 532 U.S. at 713 (holding that an employee may be a supervisor if he or she holds the authority to exercise "any 1 of the 12 listed supervisory functions") (emphasis added). As such, it is the Board's responsibility, in each of the cases before it, to ensure that a clear distinction is made between the assignment and direction functions.

C. The Definition of "Responsibly" to Direct

The Board's Notice and Invitation to File Briefs further solicits positions as to the meaning of the word "responsibly" in the statutory phrase "responsibly to direct." Cf. Providence Hosp., 320 NLRB at 727-29 (noting that the Board, in past supervisory cases involving direction of employees, generally had focused on Section 2(11)'s "independent judgment" requirement rather than the word "responsibly"). Amici submit that "responsibly,"

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[6] In Providence Hosp., 320 NLRB at 727, the Board suggested that it was an open question as to whether "assign" for Section 2(11) purposes includes not simply the power to assign an employee to a particular location, shift or hours, but also the power to assign an employee to a particular task. To the extent that any such question existed, this Board has answered it in Arlington Masonry Supply, 339 NLRB No. 99 (2003). There, the Board held that an employee exercised "independent judgment in assigning work" where he "assigns specific jobs [to another employee] while reserving other duties for himself." Id. (emphasis added). In all events, Amici submit that the text of Section 2(11) would not support the type of possible limitation to the term "assign" envisioned by Providence Hosp.

like other Section 2(11) terms, must be interpreted so as to give effect to the plain meaning of the term as it is used in the context of the statute.

"To be responsible is to be answerable for the discharge of a duty or obligation." Ohio Power Co., 176 F.2d 385, 387 (6th Cir. 1949); see also Webster's, 1228 (defining responsible as "[l]iable to respond; likely to be called upon to answer; accountable; answerable"); OED, Vol. VIII, R 542 (defining responsible as "answerable, accountable (to another for something); liable to be called to account").[7] As such, "[t]o direct workers responsibly, a supervisor must be answerable for the discharge of a duty or obligation or accountable for the work product of the employees he directs." Entergy Gulf States, 253 F.3d at 209 (internal quotations omitted); see also Evergreen New Hope, 2003 WL 21259895 at *2 (similar); Spontenbush/Red Star Cos., 106 F.3d at 490 (similar); NLRB v. Adam & Eve Cosmetics, Inc., 567 F.2d 723, 728 (7th Cir. 1977) (similar).

In properly applying such a definition, the burden of proving "responsible" direction is not unduly onerous. Cf. Glenmark Assocs., 147 F.3d at 333 (wondering whether the Board's post-HCR interpretation of the term independent judgment was an attempted "end run around an unfavorable Supreme Court decision"). In Evergreen, for example, the Court of Appeals determined that the employer had demonstrated that charge nurses responsibly directed others with testimony "that a meeting was held with the charge nurses to remind them of their responsibility to ensure that certified nurse assistants acting under their supervision were properly distributing nourishments to their patients." 2003 WL 21259895 at *2. Similarly in

[7] Providence Hosp., 320 NLRB at 717, suggested that "responsibly" was ambiguous because definitions of the term range "from being held accountable for one's own actions, to being accountable for the actions of another, to being reliable." Amici disagree. In speaking of responsible direction of others, being held accountable for one's own actions or the actions of another is a distinction without a difference. Furthermore, the "being reliable" definition makes no sense in the context of Section 2(11). If such a definition were to attach, persons who were capable directors of others would achieve Section 2(11) status, where as those lax in their duties would not—a result Congress could not have intended.

Quinnipiac College, 256 F.3d at 76, the employer demonstrated supervisory status with evidence "a shift supervisor [had been] reprimanded for the actions of two security employees" and another for allowing a "situation to get out of control." Thus, where an employer presents credible evidence that it has held an employee "answerable for the discharge of a duty or obligation or accountable for the work product of the employees he directs," the Board should find that the employee has engaged in "responsible direction."

D. The "Tension" Between Sections 2(11) and 2(12)

The Board's Notice and Invitation to File Briefs also solicits positions as to whether there is tension between Sections 2(11) and 2(12) of the Act and as to how, if such tension exists, it may be resolved. Perhaps suggesting an answer to these questions, the Notice further solicits opinions as to the distinction, if any, between directing the "manner of others' performance of discrete tasks" and directing "other employees." See Kentucky River, 532 U.S. at 720-21 (raising—but having "no occasion to consider"—the possibility that the Board could offer such a "limiting interpretation" of responsible direction). In the past, the Board has attempted to defend non-textually based limitations to Section 2(11) as a means to relieve the purported tension between Section 2(11)'s exclusion of "supervisors" from the Act's coverage and Section 2(12)'s inclusion of "professional" employees. See, e.g., id. at 719-20. In reality, however, the alleged conflict between the two sections has been greatly overstated. Furthermore, to the extent that any such conflict exists, it does not and cannot justify interpretations of Section 2(11) that distort the plain and ordinary language of that section.

As Member Cohen pointed out in his dissent in Providence Hosp., the application of basic principles of statutory construction—such as the maxim that "each . . . section of the Act is to be given effect" and that "the Act is to be construed so as to avoid conflicts between the sections thereof"—reveals that there is no true conflict between Section 2(11) and Section 2(12).

320 N.L.R.B. at 736 (Cohen dissenting). As Member Cohen noted, it is, of course, true that professional employees are covered by the Act and supervisors are not. It is also true that some of the language in Section 2(11) is roughly paralleled in Section 2(12). Section 2(11) defines a supervisor, in part, as one who uses "independent judgment" in the execution of one or more enumerated activities. Section 2(12) defines a professional employee, in part, as one who uses "discretion and judgment" in the exercise of his or her duties. Nevertheless, the distinction between Section 2(11) and Section 2(12) is "substantial and real." Id. at 737.

> The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-a-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs. A professional exercises discretion and judgment with respect to tasks that he or she performs.

Id. (emphasis added); see also Attleboro Assocs., 176 F.3d at 168 ("There is an obvious distinction between exercising independent judgment or acquired skill in completing a task, on the one hand, and using independent judgment in performing one of the 12 section 2(11) tasks, on the other.").

Member Cohen then went on to illustrate the distinction between an employee's use of judgment in the execution of a professional task assigned to the employee, and the use of judgment in supervision of other employees. He did so in the context of the nursing and in the context of directions given to other employees.

> Thus, for example, the task of devising a patient treatment plan involves the use of professional judgment. The nurse who devises that plan is a professional employee. But, the nurse who then administers the plan may have to exercise supervisory responsibilities vis-à-vis employees. For example, the nurse must decide which of the various tasks (outlined in the plan) must be done first, and the nurse must select someone to perform that task. In the words of Senator Flanders [the author of the Act's "responsibly to direct" language] the nurse must decide "what job will be undertaken next and who shall do it." In addition, the nurse

> must take steps to assure that the task is performed correctly. In the words of Senator Flanders, the nurse gives "instructions for its proper performance, and training in the performance of unfamiliar tasks."

Id. The Second Circuit has illustrated the distinction similarly:

> It may be the case that one who makes a judgment about the need for certain actions based on specialized knowledge and experience and exercises no further authority is not a statutory supervisor. But where the responsibility to make such a judgment and to see that others do what is required by that judgment are lodged in one person, that person is a quintessential statutory supervisor. For example, if one's responsibility for a particular patient is exhausted by indicating on a form a treatment program, the actual treatment being the entire responsibility of others, it may be that one is not a supervisor. However, where one must both determine a treatment and ensure that others administer the treatment, it can hardly be said that supervisory authority is not being exercised.

Schnurmacher, 214 F.3d at 268 (emphasis added). In short, then, when a professional employee exercises judgment in the execution of one of Section 2(11)'s listed functions—including the giving of directions to others—that employee is properly classified as a supervisor.

Such analysis[8] does not create "tension" between Section 2(11) and 2(12), but rather gives effect to the plain meaning of both provisions. In all events, even assuming arguendo that some tension did exist, the Supreme Court has repeatedly made clear that the Board may not "distort[] the statutory language" of Section 2(11) to resolve it. Kentucky River, 532 U.S. at 720 (quoting HCR, 511 U.S. at 581 (quoting NLRB v. Yashiva Univ., 444 U.S. 672, 686 (1980))). Plainly, "[t]he Act does not distinguish professional employees from other employees for the purposes of the definition of supervisor in § 2(11)." HCR, 511 U.S. at 581; see also Attelboro

[8] To be clear, in acknowledging the textually driven distinction between the exercise of judgment for the purposes of Section 2(11) and for the purpose of Section 2(12), Amici, do not endorse the idea that there is a distinction between "directing the manner of others' performance of discrete tasks" and the direction of "other employees." Such a distinction is not supported by the text of Section 2(11). To the contrary, it would gut the very purpose for which the term "responsibly to direct" was added to the Act. See, e.g., 93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders) (describing a supervisor who gives responsible direction as one who "gives instruction for proper performance" and "training in the performance of unfamiliar tasks to the worker to whom they are assigned") (emphasis added).

Assocs., 176 F.3d at 168 ("Consequently, it is impossible to comprehend how a nurse's status as a professional employee negates her status as a supervisor."). As such, the Board may not avoid a straightforward and textually honest application of Section 2(11) in nurse-supervisor cases, or other cases involving professional employees, simply because it dislikes the results. See Providence Hosp., 320 NLRB at 726 (acknowledging this Court's command that "Section 2(11) must drive Board policy, not the other way around").

E. Recent Developments In Management

The Board's Notice and Invitation to File Briefs next solicits positions as to the extent that, in interpreting Section 2(11), the Board may interpret the statute to take into account "more recent developments" in management. Amici recognize the Board's authority to interpret the Act and its ability to judge labor policy. See, e.g., Kentucky River, 532 U.S. at 713, 720 (recognizing the Board's authority, "within reason," to construe ambiguous provisions of the Act and to "judge [labor policy] without our constant second-guessing"). Nevertheless, as noted, it is Amici's fundamental position that—as the Supreme Court has repeatedly recognized—any interpretation of the Act must be grounded in the plain language of the Act's text. See, e.g., id. at 720 (stating that "the problem with the Board's arguments" in the case was that the policies the Board espoused "cannot be given effect through this statutory text"); HCR, 511 U.S. at 581 (holding that perceived tension between different portions of the Act does not give the Board license to "distort[] the statutory language"). As such, while policy considerations may inform the Board's interpretation of the language of the Act, such considerations do not grant the Board license to usurp Congress' legislative powers. See, e.g., Entergy Gulf States, 253 F.3d at 210 (holding that a case's "specific facts, not the Board's perceptions of labor trends, . . . must determine how the relevant law applies").

In this vein, however, it must be emphasized Congress' overarching aim in Section 2(11) was to give effect to the policy that an employer should be permitted to treat supervisors as supervisors. To the extent that policy considerations come into play, the Board's interpretations of Section 2(11) must give effect to Congress' policy—made clear in the plain language of the Act—that the appropriate balance between employers and unions be maintained and that employers be guaranteed sufficient numbers of reliable supervisors to conduct their operations in an efficient manner.

1. In Section 2(11), Congress Recognized That Ensuring The Loyalty Of Supervisors Is Crucial To Employers

With good reason, it is the policy of Section 2(11) to permit employers to treat as supervisors those who so act. Section 2(11) is a product of Congress' efforts to preserve an equilibrium of power in the workplace. See, e.g., Florida Power & Light Co., 417 U.S. at 807. Thus, "[t]he structure of [29 U.S.C.] § 152 ensures that employers may rely on supervisors to exercise their independent judgment without the threat of accountability to the employees whom they supervise." Winnebago Television Corp., 75 F.3d at 1213, 1217.

The legislative history of the Taft-Hartley Act, which added Section 2(11), clearly illustrates this point. Senator Taft, for instance, noted that "it is impossible to manage a plant unless the foremen are wholly loyal to the management." 93 Cong. Rec. 3952 (daily ed. April 23, 1947). The Senate Committee on Labor and Public Welfare noted that "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No.80-105, at 3 (1947).

Although it was the Senate's definition of supervisor that was ultimately included in the Act, it is worth noting that similar statements regarding the importance of supervisor loyalty were made in the House of Representatives. For instance, the House Committee on Education and Labor noted that employers, "as well as workers, are entitled to loyal representatives in the plants, but when the foreman unionize . . . they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them." H.R. Rep. No. 80-245, at 14 (1947). The House Committee concluded that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust." Id. at 17. Importantly, the House Committee specifically listed [d]octors, nurses, [and] safety engineers . . . ." as examples of the types of positions that must remain fully faithful to the interests of the employer, and not the unions. Id. at 16.

As Congress envisioned, then, supervisors with divided loyalties will be less effective monitors of unionized employees under their supervision. Section 2(11) thus seeks to ensure that employers have in place a reliable supervisory team to maintain efficient operations in their facilities. This is the policy that drives Section 2(11), and it is the policy that is espoused in the text of the Act. See Winnebago Television Corp., 75 F.3d at 1213, 1217. In short, this is the policy to which the Board must adhere in all events. See, e.g., Providence Hosp., 320 NLRB at 726 (acknowledging the Supreme Court's mandate that the text of Section 2(11) must drive Board policy, "not the other way around").

2. Recent Changes in the Health Care Field, and the Resulting Increase in Supervisory Functions by Health Care Professionals

Congress intended that its policy, espoused in Section 2(11), should apply equally in all fields of employment. The text of Section 2(11) does not distinguish among types of employers

in defining the term supervisor. Thus, while Kentucky River was a case from the health care field, it has properly led to the reversal of several prior Board supervisory determinations in other industries that relied on non-textually based interpretations of the Act. See, e.g., Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896, 899-900 (8th Cir. 2002) (rejecting as inconsistent with Kentucky River the Board's contention that because television producers "used judgment stemming from their 'own experience, skills, training or position,'" they "did not exercise independent judgment"); Public Serv. Co., 271 F.3d at 1219-21 (similar conclusion in decision involving power company's senior system operators); Entergy Gulf States, 253 F.2d at 209-11 (same).[9]

Still, because prior Board efforts to limit the reach of Section 2(11) were largely aimed at nurses and other health care professionals, see, e.g., Providence Hosp., 328 NLRB at 733; Northcrest Nursing Home, 313 NLRB 491, 493-94 (1993), recent developments in the health care field are worth noting as a concrete illustration of the importance of Congress' policy in Section 2(11). Indeed, in health care workplaces, employers increasingly are forced to rely on the supervisory judgments of nurses and other professionals. Health care employers' ability to place such reliance in their supervisors is not simply a matter of business efficiency, but rather a matter essential to the provision of quality patient care in this country.

a. The Increasing Supervisory Role of Many Health Care Professionals

In the many health care workplaces, the supervisory responsibilities borne by nurses and other health care professionals are increasing. For instance, in a recent survey of 857 nurses, "94% of respondents say that the RN's breadth of responsibility has broadened within the past three years." Amy Slugg Moore, The Way it is Today: Results of a Survey on Nurses'

[9] See also Dolan, supra note 3 (arguing that Kentucky River mandates reversal of Mississippi Power).

Perception of the Nursing Profession, RN, Oct. 1997, at 27. Additionally, questions as to how respondents believed that the profession would change in the future revealed that the "biggest jumps" are expected in "supervisory tasks." Id.

RN duty and job descriptions illustrate these points. According to the North Carolina Nurses Association, it is the RN's job to "direct and supervise nursing support personnel such as LPNs." North Carolina Nurses Ass'n, RN Education, at *http://www.ncnurses.org/rn.htm* (last visited Sept. 11, 2003). In the field of emergency care, "'[a]ll non-RN caregivers, involved in providing nursing care . . . [are] directly supervised by and responsible to professional emergency registered nurses." Iowa Nurses' Ass'n., Nurses and EMS Personnel: Collaboration, Delegation and Accountability, at *http://www.iowanurses.org/nurseems.htm* (last visited Sept. 11, 2003). In the area of home-based health care, federal Medicare regulations permit LPNs to provide nursing services in patients' homes, but only so long as LPNs, and any unlicensed aides, are "under the general supervision of registered nurses." Nat'l Ass'n for Hospice Care, NAHC Legislative Blueprint for Action at *http://www.nahc.org/NAHC/LegReg/02bp/lbp02/html#2-11* (last visited Sept. 3, 2003). Additionally, in the long-term-care area, RNs typically act as on-site administrators. See Agency for Healthcare Research and Quality, Long-Term Care: Experts Recommend Minimum Nurse Staffing Standards for U.S. Nursing Homes, at *http://www.ahcpr.gov/research/jun00/0600ra14.htm* (last visited Sept. 11, 2003). Indeed, in many long-term-care facilities, charge nurses and other employees with similar duties and responsibilities are often the highest ranking and sole management representatives at the facilities on evenings, nights, weekends and holidays. Thus, prior Board decisions in many cases resulted in a finding that a long-term-care provider had no supervision present for significant periods of time. Such decisions lack legal basis and defy common sense. See, e.g., Glenmark

Assocs., 147 F.3d at 341 ("We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing twenty-four hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment regarding proper staff levels and patient assignments."); Grancare v. NLRB, 137 F.3d 372 (6th Cir. 1998) (noting that an interpretation of Section 2(11) that would mean that a nursing home had no on-site supervision almost half the time was not a reasonable conclusion for a well-run nursing home); see also Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719, 721 (7th Cir. 2000) ("[T]he Board's ruling has the curious implication that a ship with more than 1000 people aboard it . . . has no supervisor on board at any time, making the situation, in the Board's view, a little like that of the Patina in Conrad's novel Lord Jim after the crew abandoned it.") (emphasis in the original); Schnuck Markets, Inc., 961 F.2d at 706 ("Nor is it a reasonable conclusion to suppose that Schnucks would operate one of its largest stores for eight hours every day with twelve to sixteen employees on staff without on-site supervision.").

The descriptions from all of the various health care fields demonstrate one common theme: that many nurses and other health care professionals shoulder the authority and responsibility for supervising other health care personnel. Health care employers hire health care professionals, not merely to act as conduits for the dictates of protocols and procedures, but rather to exercise independent judgment in numerous respects, including the supervision of other employees and to ensure the delivery of the highest quality patient care. See Beverly Cal. Corp., 970 F.2d at 1553 ("It is perfectly obvious that the kind of judgment exercised by registered nurses in directing. . . nurse's aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not 'merely routine.'"). The unpredictability and varied nature of the health care profession—and thus the varied circumstances under which nurses and other health

care professionals labor—belies any generalized attempt to label the exercise of such supervisory authority routine. Stated alternatively, the human body and its functions are not routine, and accordingly, supervisory acts taken in connection with the care and treatment of human beings are certainly not routine, but require the exercise of considerable independent judgment.

b. Factors Leading To Such Increased Supervisory Roles

There are multiple factors affecting today's health care employers that mandate increasing reliance by health care employers on supervision by nurses and other health care professionals. As an initial matter, using nursing as an example, the demand for nursing services is increasing in the United States at a time in which the supply of nurses is decreasing. On the one hand, as the American Nursing Association recently noted, "aging and an increase in chronic illness will increase the demand for nurses—particularly those with baccalaureate or master's degrees—in hospitals and nursing homes." American Nursing Assoc., 1999 House of Delegates Summary of Proceedings—Examining the Nursing Workforce, at *http://www.nursingworld.org/about/summary/sum99/workforc.htm* (last visited Sept. 11, 2003). Furthermore, "[r]apid changes in technology and advances in patient care will increase the demand for nurses over the long term. While technological advances in patient care may reduce the incidence of some diseases, these reductions in morbidity could be offset by increases in the longevity of individuals with chronic illnesses." Id.

Despite the increasing demand for nurses, Peter Buerhaus, Director of the Harvard Nursing Research Institute, has predicted that the United States will experience:

> a significant shortage of registered nurses . . . beginning around 2007. Buerhaus foresees a rising demand for registered nurses based on such factors as an aging population, increased longevity of the chronically ill, technological advances, the increased prevalence of antibiotic-resistant infections, cost-cutting pressures of managed care, the shift from high-cost acute care facilities to

> lower cost ambulatory and community-based settings, and increased attention to quality improvement.

Id. Some observers are even less optimistic, and have declared that the nursing shortage crisis is already here and will only worsen over time. For instance, the U.S. Department of Health and Human Services found that in 2000 the national supply of nurses was already 6 percent short and has predicted that the shortage will reach 12 percent by 2010 and 29 percent by 2020. See U.S. Dep't. of Health and Human Servs., Health Resources and Servs. Admin., Bureau of Health Professions, Projected Supply, Demand, and Shortages of Registered Nurses: 2000-2020, July 2002, available at *http://bhpr.hrsa.gov/healthworkforce/rnproject* (last visited Sept. 17, 2003). "The projected shortage in 2020 results from a projected 40 percent increase in demand between 2000 and 2020 compared to a projected 6 percent growth in supply." Id. This ever-increasing nursing shortage has increasingly forced health care employers to call on nurses to delegate nursing tasks to others—and to supervise others in the execution of those nursing functions. See King, supra note 2, at 347.

Additionally, the incredible economic strain under which many health care providers currently operate is also forcing an increased reliance on supervision by nurses and other health care professionals. On the one hand operating expenses for health care employers are increasing. Indeed, the Bureau of Labor Statistics has recently found that "[w]age and salary employment in the health services industry is projected to increase more than 25 percent through 2010, compared with an average of 16 percent for all industries." Bureau of Labor Statistics, U.S. Dep't of Labor, No. SIC 80, Health Services (2003). On the other hand, decreasing reimbursements from private health plans and Medicare and Medicaid have subjected American health care providers to the economic equivalent of a one-two knockout punch. See generally, Bruce Siegel, Public Hospitals—A Prescription for Survival, The Commonwealth Fund, October

1996, available at *http://www.cmwf.org/programs/minority/siegel.asp* (last visited Sept. 19, 2003). Congress, for its part, has been reluctant to adjust reimbursements under Medicare and Medicaid, and even has taken action to cut reimbursements in some health care areas. See Robert Kuttner, The American Health Care System—Wall Street and Health Care, The New England Journal of Medicine, February 25, 1999 at 664. For example, "[t]he Balanced Budget Act [of 1997] cut a total of $14.3 billion from Medicare's home care budget . . . . In addition, the act instituted a new prospective payment system for nursing homes." Id. Similarly, many private health care plans have also refused to increase their reimbursements for increasingly expensive treatments, and some have taken steps to lower their reimbursement rates. See id. As with the reductions in Medicare/Medicaid reimbursements, this trend has subjected hospitals to heretofore unseen economic pressures.

Furthermore, health care employers face increasing pressure from medical malpractice lawsuits. "Between 1994 and 2001, typical the median medical malpractice award increased 176% to $1 million dollars." U.S. Cong. Joint Econ. Comm., Liability for Medical Malpractice: Issues and Evidence, May 2003, available at *http://www.house.gov/jec/tort/05-06-03.pdf* (last visited Sept. 17, 2003). "The result has been higher malpractice insurance premiums for health care providers, which in turn has led to higher costs for the health care system as well as reduced access to medical services." Id. Indeed, the strain on health care employers here has been enormous, and only compounds the financial pressure under which they operate. See, e.g., Margaret Ramirez, Malpractice Disaster Warning, Newsday, June 4, 2003, at A24 (reporting warnings that "hospitals in New York could be forced to lay off workers, shut down emergency rooms and stop delivering babies unless a state medical malpractice law is amended"); Addy Hatch, Rate Hikes Pound Hospitals, Journal of Business--Spokane, Sept. 26, 2002, at A1

(reporting that "higher hospital malpractice costs threaten hospitals' financial stability"); David Barkholz, Hospitals Fact Hard Hit For Insurance: Malpractice Rates Expected to Skyrocket, Crain's Detroit Business, June 24, 2002, at 3 (similar). Accordingly, it is increasingly important that as thorough and comprehensive supervision as possible is present in today's health care setting to ensure the highest quality of patient care possible in order to reduce malpractice exposure.

Because of these financial pressures and litigation exposure, many health care providers are finding themselves operating in crisis mode. Certain large medical systems have reported losing millions of dollars per year, in large part due to reductions in reimbursements. Not surprisingly, an alarming number of large hospital organizations have or are close to filing for bankruptcy. See, e.g., Press Release, Agency Prepared As Another Nursing Home Chain Files for Bankruptcy, available at *http://www.fdhc.state.fl.us/Executive/Communications/Press_Releases/archive/2000/02_02_2000.shtml* (last visited Sept. 19, 2003) (noting, in February 2000, that seven health care providers had filed for bankruptcy in the preceding six months). In addition, a significant number of acute-care hospitals have closed their doors due to the crisis in reimbursement. See, e.g., Julie Bryant, Grady Near Bankruptcy, Atlanta Business Chronicle, June 25, 2003, available at *http://atlanta.bizjournals.com/atlanta/stories/2003/06/23/daily29.html* (last visited Sept. 11, 2003) (noting that Georgia's largest public hospital was near bankruptcy); Chris Silvia, Doctors Community Healthcare Files for Bankruptcy, Washington Business Journal, Nov. 22, 2002, available at *http://washington.bizjournals.com/washington/stories/2002/11/18/daily36.html* (last visited Sept. 11, 2003) (noting a bankruptcy that affected two hospitals, among other entities); Ron Harder Hospital Files for Chapter 11 Bankruptcy, The Kansasan Online, June 28, 2002, available at *http://thekansan.com/stories*

/062802/fro_0628020010/shtml (last visited September 17, 2003) (noting a bankruptcy that occurred days after a hospital's 100th anniversary).

Needless to say, these realities force health care providers to make difficult choices. Layoffs are becoming more commonplace as health care institutions experience significant revenue shortfalls. For example, Tenet Healthcare Corp., the second largest hospital chain in the country, recently announced plans for employees layoffs and its divesture of 14 hospitals to eliminate $100 million in expenses. See Stephanie Patrick, Tenet Healthcare Predicting Local Layoffs, Dallas Business Journal, Mar. 31, 2003, available at *http://www.bizjournals.com/dallas /stories/2003/03/31/story5.html* (last visited Sept. 11, 2003). Likewise, the University of Pennsylvania Health Care System recently laid off 1,100 employees, accounting for nine percent of the System's total personnel. See Press Release, Press Statement from the Penn Health System, May 25, 1999, available at *http://www.upenn.edu/almanac/between/PHEALTH-layoffs.html* (last visited Sept. 17, 2003). William N. Kelley, MD, CEO of the Penn Health System, and Dean of the University of Pennsylvania School of Medicine, commented, "This is a very sad day for all of us at the University of Pennsylvania Health System. . . . The combination of government cutbacks; denied, delayed or reduced payments from insurers; and increased amounts of uncompensated care is crippling hospitals and health systems nationwide." *Id.*

To make matters worse, health care institutions are experiencing increased turmoil in their workforces. The shortage of qualified staff personnel makes the jobs of hospital employees more difficult. See, e.g., Jeff Myers, Staff Shortage Makes Hard Job More Difficult, Nurses Say, Press Republican Online, Oct. 29, 2000, at *http://www.pressrepublican.com/Archive/2000/ 10_2000/102920002.htm* (last visited Sept. 17, 2003). In this context, strikes are becoming more and more commonplace. For example, 1,200 nurses employed by the Washington Hospital

Center in Washington, D.C., recently staged a strike that lasted more than seven weeks. See Avram Goldstein, Proposal Could End Walkout by D.C. Nurses, Washington Post, November 7, 2000, at B1; see also Nurses at Three Hawaii Hospitals Strike for Retiree Benefits, Safe Staffing Issues, Daily Labor Report, Dec. 5, 2002, at A-1; David Kelly, Health Care Workers Strike at 18 Hospitals, Demand Increases in Pay Labor, L.A. Times, December 15, 2000, at B2 (reporting that "[t]housands of health care employees who say they are so overworked that patient care suffers walked off the job at 18 hospitals across the state Thursday to press demands for higher pay and increased staffing.").

Perhaps the most serious repercussion of the current turmoil facing many health care providers is the potential impact on the quality of patient care. As one commentator noted, cutbacks in reimbursement for services "might seriously compromise quality of care." Robert H. Binstock, Symposium, Public Policies on Aging in the Twenty-First Century, 9 Stan. L. & Pol'y Rev. 311, 318 (1998). In short, "the pace and nature of" the changes currently experienced in the health care industry "— along with heightened fears of layoffs and staff restructuring—have prompted concerns among RNs that patient care has suffered or will suffer and that the demands placed on nursing staff have led to higher incidences of work- related injuries and stress." Office of News and Public Information, Hospitals and Nursing Homes Need Changes in Mix of Nursing Personnel, at *http://www4.nationalacademies.org/news.nsf/isbn/POD663?OpenDocument* (last visited Sept. 17, 2003).

In light of the changes the health care industry has undergone, there is no question but that, in order to deliver high-quality care more efficiently, registered nurses and other health care professionals are being granted more and more supervisory powers by their employers. For example, one private California health system, in an effort to economize, granted Advanced

Practice Registered Nurses ("APRNs") a broad range of duties traditionally reserved to doctors. As a committee of the Institute of Medicine, charged by Congress with investigating the state of nursing in the United States, concluded:

> [i]ncreased pressure to deliver cost-efficient care to patients with more serious and often multiple conditions has forced hospitals to redesign delivery of care and reassess the roles of all nursing personnel. RNs have moved from direct patient care to coordinating and supervising patient care in hospitals . . . . In some institutions, nurse assistants are assuming greater responsibility for direct patient care under RN direction. . . .
>
> Registered nurses with advanced training and skills will [increasingly] be called on to fill roles that require professional judgment, supervision, and direction of the work of others. . . .
>
> According to the Committee Chairperson, "'As hospitals reorganize their staffing mix, continuing education in hospitals and schools should focus more on providing better management tools to nurses, including delegation and supervisory skills. . . .'"

Id.

Therefore, given the sea change the health care industry continues to experience, health care providers seeking to stay afloat are increasingly turning to cost-efficient nurses and other health care professionals to supervise and oversee the delivery of health care. Indeed, one commentator has noted that as nurses in today's health care industry are called upon to "supervise more and more unlicensed personnel," it is increasingly important to provide registered nurses with the "managerial education they need to fulfill their widening roles in the late 1990s and beyond." Kerry Smith, Back to School: Kaiser Offers Nurses a Chance to Study for BSN and Stay in the Workplace, Nurseweek, July 20, 1998, available at *http://www.nurseweek.com/features/98-7/school.html* (last visited Sept. 17, 2003).

c. Employers' Need to Rely on Their Supervisors Is Unquestionable

Thus, it is plain that nurses and health care professionals are increasingly called upon to fulfil supervisory roles. It is equally plain that health care employers' ability to reliably count on such individuals to act as supervisors is a matter of great importance. As the Supreme Court noted in HCR:

> [W]e do not share the Board's confidence that there is no danger of divided loyalty here. Nursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction. If so, the statute gives the nursing home owners the ability to insist on the undivided loyalty of its nurses. . . .

HCR, 511 U.S. at 580-81. Indeed, if health care professionals in supervisory positions had such divided loyalties, the result would be a decrease in oversight and discipline of health care workers that would endanger not only the safety and welfare of the workers themselves, but would undoubtedly also endanger the health and safety of the patients under their care and also potentially increase litigation exposure for their employers.

In sum, then, the need for health care employers to rely on nurses and other health care professionals as supervisors—like the need of employers in other fields to rely on their front-line supervisors—is increasing, and the consequences of an interpretation of the Act that precludes such reliance would be dire. This fact further supports the position that the Board must utilize a straightforward, textual interpretation of Section 2(11) because, as detailed in other sections of this Brief, such an interpretation is the only one that gives effect to Congress' stated intent in enacting the provision.

F. The Distinction Between Supervisors and "Straw Bosses"

The Board's Notice and Invitation to File Briefs next seeks positions as to the functions or authority that distinguish "straw bosses," "leadmen," and similar figures from those vested with

"genuine management prerogatives." Amici submit, once again, that such distinctions must be drawn with reference to the text of the Act. A person imbued with genuine authority is someone who, in the interests of the employer, exercises the listed Section 2(11) functions using independent judgment. See, e.g., Highland Superstores, 927 F.2d at 920 (noting that Congress expressed its intent to exclude straw bosses and leadmen from the definition of supervisor by adding Section 2(11)'s "second clause—the portion following the 'if'," which "limits the definition . . . to people whose direction of the work of others, etc., is not 'merely routine'"). This is the test provided in the text, and it is the test that the Board and the Courts must apply.

Indeed, prior to passing the Taft-Hartley Act, Congress considered—and rejected—arguments that the language chosen for Section 2(11) was too broad and excluded too many persons from the Act's protections. The Minority Report from the House Committee on Labor and Education complained that although Congress had purported:

> to define the meaning of "supervisor," actually, supervisors play only a minor role in this definition, which includes all persons having only slight authority such as pushers, gang bosses, leaders, second hands, and a host of similarly placed persons with no actual supervisory status. It is sufficiently broad to cover a carpenter with a helper.

H.R. Rep. No. 80-245, at 71 (1947). Thus, there can be no dispute that—in 1947—Congress was aware of concerns as to the breadth of Section 2(11).[10] Nevertheless, Congress chose to adopt the provision, plainly believing that its language did, in fact, exclude from supervisory status "straw bosses," "leadmen," and similar persons.

[10] As previously noted, Congress ultimately adopted the Senate's version of Section 2(11). Nevertheless, while the House's version included as supervisors persons such as labor relations personnel and confidential employees, it was similar to the Senate's in that it defined a supervisor to include those with the authority to "hire transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline." H.R. 3020, as reported, at Sec. 2(12)(A) (1947). As such, the House Minority Report's critique may fairly be said to have encompassed the Senate's version as well.

In all events, although terms such as "straw boss" are often bandied about with little apparent forethought in opinions finding a lack of supervisory status, a closer examination reveals that the plain language of Section 2(11) adequately serves to limit supervisory status to only those who exhibit "genuine management prerogatives." The term "straw boss" is derived from the logging industry:

> In the early days of logging in mountainous country straw was spread upon slopes too steep for horses to hold back a sled load of logs. . . . After each passage, sometimes at a full gallop to keep the horses ahead of the load, the straw was naturally displaced so a man with a pitchfork was posted at each slope to keep the straw evenly distributed. Although teamsters were men of consequence in the lumber camps, the rule was that they were not to start down a slope until the far humbler functionary with a pitchfork, using his "independent judgment," passed word that the slope was prepared. . . . Perhaps a modern counterpart would be an attendant at a company parking lot with the authority to direct higher- ups in the organization with respect to parking their cars.

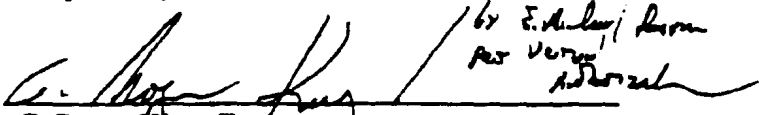
NLRB v. Swift & Co., 292 F.2d 561, 563 n.2 (1st Cir. 1961) (emphasis added). Straightforward and common sense understandings of terms such as "independent" and "responsibly" clearly deny Section 2(11) status to parking lot attendants and other "functionar[ies] with a pitchfork" whose "authority" is wholly illusory. On the other hand, such straightforward and common sense understandings grant Section 2(11) status to those who, using judgment and forethought, exercise managerial authority in assignments, directions and other supervisory tasks.[11]

[11] The Board's Notice and Invitation to File Briefs also solicits positions as to the extent, if at all, the Board should consider secondary indicia of supervisory status in analyzing Section 2(11). As Amici understand the Board's present stated position, secondary indicia are considered collateral evidence going to the question of independent judgment where there is evidence that the purported supervisor engages in listed Section 2(11) functions. See, e.g., Custom Mattress Mfg., Inc., 327 NLRB 111, 112 n.2 (1998); General Security Servs., 326 NLRB at 312, 312-13 (1998). Amici submit that this position is consistent with the textually-based interpretation approach advocated in this Brief, and it is consistent with the interpretive role that Amici have argued for policy considerations. Amici thus submit that the Board should continue with this present approach. In doing so, however, Amici note that the Board's consideration of secondary indicia must be fair and consistent. Compare Empress Casino, 204 F.3d at 721 (criticizing Board decision holding that no supervisor was ever present in the employer's facility); Schnuck Markets, 961 F.2d at 706 (criticizing Board decision holding that no supervisor was present for significant periods of the day); Glenmark Assocs., 147 F.3d at 341 (similar); Grancare, 137 F.3d at 376 (similar).

CONCLUSION

As detailed above, this Board should use the cases before it to return to a straightforward, textually based interpretation of Section 2(11) that gives effect to Congress' intent as stated in the plain language of the Act. The supervisory determinations in the cases before the Board should be reversed to the extent that they strayed from such a textually based interpretation.

Respectfully submitted,



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Dated: September 18, 2003

CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, the undersigned hereby certifies that the original and 24 true and correct copies of the foregoing Brief of Amici Curiae The Chamber of Commerce of The United States, The Ohio Hospital Association and The Society For Human Resource Management were served via Federal Express, on this 18th day of September, 2003, upon the following:

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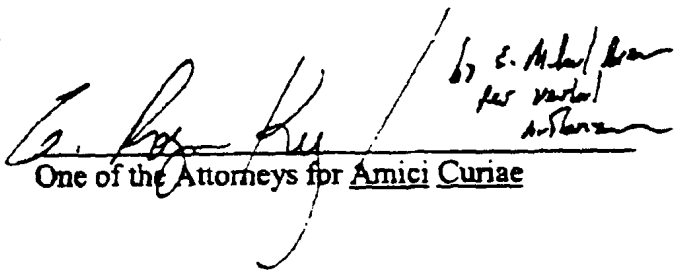

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